UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

THE BOARD OF TRUSTEES OF THE SOUTHERN CALIFORNIA IBEW-NECA DEFINED CONTRIBUTION PLAN, On Behalf of Itself and All Others Similarly Situated, Plaintiff, vs. THE BANK OF NEW YORK MELLON CORPORATION, et al., Defendants.	Civil Action No. 09-cv-06273 (RMB) CLASS ACTION **PLAINTIFF'S REPLY MEMORANDUM IN SUPPORT OF ITS MOTION FOR CLASS CERTIFICATION, APPOINTMENT OF CLASS REPRESENTATIVE, AND APPOINTMENT OF CLASS COUNSEL** ECF Case *Contains Confidential Information*

TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE PROPOSED CLASS SATISFIES RULE 23 2

A. Common Issues of Law and Fact Predominate..2

B. Numerosity Is Satisfied Because IBEW May Represent Participants Holding Any of the 10 Lehman Notes..6

C. Class Treatment Is Superior to Hundreds of Individual Lawsuits..........................8

III. PROFESSOR MILLER'S EXPERT OPINION IS PROPER AND SUPPORTS CERTIFICATION 9

TABLE OF AUTHORITIES

CASES

Bd. of Trs. of the AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.,
269 F.R.D. 340 (S.D.N.Y. 2010) ("*AFTRA*") .... *passim*

Consol. Rail Corp. v. Town of Hyde Park,
47 F.3d 473 (2d Cir. 1995)........ 6

Emps.' Ret. Sys. of the Gov't of the Virgin Islands v. J.P. Morgan Chase & Co., 804 F. Supp. 2d 141, 150 (S.D.N.Y. 2011)........ 7, 8

Fogarazzo v. Lehman Bros., Inc.,
2005 WL 361205 (S.D.N.Y. Feb. 16, 2005)........ 10

In re Dynex Capital, Inc. Sec. Litig.,
2006 WL 314524 (S.D.N.Y. Feb. 10, 2006)........ 7

In re Lehman Bros. Secs. & ERISA Litig.,
684 F. Supp. 2d 485 (S.D.N.Y. 2010)........ 8

In re Morgan Stanley Mortg. Pass-Through Certificates Litig.,
2010 WL 3239430 (S.D.N.Y. May 18, 2010) 8

In re Salmon Analyst Level 3 Litig.,
350 F. Supp. 2d 477 (S.D.N.Y. 2004)........ 7

In re Visa Check/MasterMoney Antitrust Litig.,
280 F.3d 124 (2d Cir. 2001)........ 10

In re Worldcom, Inc. Sec. Litig.,
219 F.R.D. 267 (S.D.N.Y. 2003) 10

New Jersey Carpenters Health Fund v. Residential Capital, LLC,
2010 WL 1527528 (S.D.N.Y. Mar. 31, 2010) 8

Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co.,
714 F. Supp. 2d 475 (S.D.N.Y. 2010)........ 8

Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.,
2005 WL 2148919 (Sept. 6, 2005)........ 7

The Board of Trustees (the "Board"), on behalf of the plaintiff, The Southern California IBEW-NECA Defined Contribution Plan ("Plaintiff," "IBEW," or the "Plan"), respectfully submits this reply memorandum in support of Plaintiff's Motion and Incorporated Memorandum of Law in Support of Class Certification, Appointment of Class Representative, and Appointment of Class Counsel ("Motion") [Dkt. No. 218].

I. INTRODUCTION

Defendant[1] makes much ado about purported differences among Class members' investment guidelines and portfolios but essentially ignores Judge Scheindlin's decision in *Bd. of Trs. of the AFTRA Ret. Fund v. JPMorgan Chase Bank, N.A.*, 269 F.R.D. 340 (S.D.N.Y. 2010) ("*AFTRA*"),[2] certifying a virtually identical class of securities lending participants having individual investment guidelines but suffering losses as a result of imprudent investments purchased and maintained en masse. Tellingly, though *AFTRA* represents the strongest (if not the only) analog to the instant certification request, Defendant devotes only three paragraphs to its rebuttal on the final two pages of its argument. *See* Memorandum of Law in Opposition to Plaintiff's Motion for Class Certification ("Opposition" or "Def. Mem.") [Dkt. No. 222] at 23-24. Further, what the rebuttal lacks in form it also lacks in substance.

Plaintiff's ERISA claims are eminently suitable to class treatment because a "one stroke" resolution, *see* Def. Mem. at 1, 2, 4, 7, 10, requires just one question to be answered: were the Lehman Notes at issue here too risky an investment for ***any*** participant's collateral account in Defendant's Program? Collateral investments like the Lehman Notes were typically made "at the

---

1 Terms defined in the Motion shall have the same meaning herein.

2 Unless otherwise noted, internal citations and quotations are omitted and emphasis is added.

[redacted]

to the Program's "buy and hold" strategy. Motion at 7-8. All applicable contracts granted BNYM full discretion to manage Class members' investments within certain Umbrella Guidelines that dictated the most aggressive investment attributes the Program would allow. *Id.* at 5-6. The 10 Lehman Notes at issue are nearly identical floating rate notes with maturities of three years or less and subject only to the credit risk of Lehman itself. Motion at 6. Defendant accordingly monitored [redacted] resolution of the Class ERISA claims will depend on Plaintiff's common evidence that ***all 10*** Lehman Notes were impermissible for ***any*** collateral account in light of (i) the risk associated with Lehman and the Lehman Notes, (ii) the requirements of the Umbrella [redacted] exposure. Further, given the similarities among the Notes, any challenges to numerosity or Plaintiff's standing to represent the Class should be quickly rejected. Having spent two years [redacted] defeat Defendant's summary judgment bid, Plaintiff and its counsel are uniquely positioned to secure the maximum possible recovery for the Class without any need to further burden the court system with hundreds of additional individual lawsuits.

II. THE PROPOSED CLASS SATISFIES RULE 23

A. Common Issues of Law and Fact Predominate

The majority of Defendant's Opposition focuses on alleged variation among Class members' earnings expectations, risk tolerances, investment objectives, investment portfolios, and communications with BNYM. Def. Mem. at 4-15. According to BNYM, this variation presents individual issues that predominate over common issues and thus precludes class certification. *Id.* This argument misses the mark.

The overriding question here as to each and every Class member is whether the Lehman Notes were impermissible for ***any*** securities lending collateral account. *See AFTRA*, 269 F.R.D. at 351 (certifying class where "plaintiffs argue[d] that the [notes] were too risky an investment for ***any*** securities lending participant by virtue of the basic, low-risk, high-quality structure that a securities lending program entailed") (emphasis in original). As in *AFTRA*, this question will be answered using "class-wide common evidence." *Id.* at 349.

The evidence is clear that BNYM marketed securities lending to ***all*** participants as a [redacted] incorporated the Program's Umbrella Guidelines and reflected the Program's conservative investment strategy. SOF ¶94. Participants could simply adopt these Umbrella Guidelines or choose [redacted] Thus, any securities held in the Program had to fit within the Umbrella Guidelines, meaning only [redacted]

The evidence supports that, beginning in August 2007 and continuing through Lehman's bankruptcy, ***all 10*** Lehman Notes amounted to "junk" (*i.e.*, not investment grade) and were thus [redacted] SOF ¶94; *see also AFTRA*, 269 F.R.D. at 349 ("Pursuant to these guidelines and profiles, [the defendant] was to invest in conservative, high-quality, low-risk assets. Plaintiffs claim, however, that the [notes] were an imprudent investment in light of the market conditions that existed at the time—evidence of which will be common to all class members.").

Accordingly, Defendant's focus on variation among Class members' specific investment guidelines, risk tolerances, investment objectives, investment portfolios, and communications is nothing more than a red herring, and ultimately not determinative of BNYM's liability.[3] *Id.* at 351 (though the defendant had "identified some differences among the guidelines and risk-return profiles, these differences are 'extremely minor' and 'none of them differentially affect the imprudence of the [] investment'"). Simply, no Class members' Guidelines permitted "junk" investments. All 10 Lehman Notes – despite any differences in CUSIP number or maturity – were treated exactly the same by BNYM because each Note's inherent risk was merely the credit risk associated with Lehman itself (*i.e.*, the risk of Lehman becoming insolvent). SOF ¶113.

---

[3] The Court should also ignore BNYM's continued reference to Plaintiff's other investment managers. *See* Def. Mem. at 1-3, 5-7, 11. What is prudent for Plaintiff's other investment managers outside of the Program has no bearing on whether Defendant was prudent in managing Class members' collateral accounts within the Program. As recognized in *AFTRA*, securities lending programs are supposed to invest generally in "conservative, high-quality, low-risk assets" for their participants regardless of any "extremely minor" differences among those participants' individual guidelines and risk-return profiles. 269 F.R.D. at 349-351. Thus, while acceptable levels of risk are consistent for all participants across the Program, the acceptable levels of risk will vary widely among those same participants' other "core" and "core-plus" money managers ***outside*** the Program. *See* SOF ¶¶28-29.

[redacted] *See AFTRA*, 269 F.R.D. at 350 ("[Defendant] was responsible for monitoring the issuer's ongoing creditworthiness and the securities lending portfolio managers relied on [Defendant] for all post-purchase due diligence. . . . Those recommendations were made without regard to any particular securities lending participant's account details, investment guidelines, or portfolio characteristics.").

[redacted]

Motion at 8. In the face of its own protective measures, Defendant utterly failed to similarly protect the Class by, for example, selling the Notes on the active open market or purchasing insurance via credit default swap contracts. *Id.*

For the same reasons recognized in *AFTRA*, Plaintiff's prudence claim under ERISA "is overwhelmingly dominated by a number of common issues of law and fact," including whether: (i) BNYM owed a fiduciary duty to all Class members; (ii) BNYM violated its duty by investing in, and holding, the Lehman Notes on behalf of all Class members; (iii) BNYM knew of, or with reasonable diligence, could have discovered Lehman's precarious financial position at the time it invested in, or continued to hold, the Lehman Notes; and (iv) Class members sustained losses as a result of Defendant's alleged breach. 269 F.R.D. at 349. The same holds true for Plaintiff's loyalty claim, which is based on BNYM's decision to maintain ***all*** of the Class members' Lehman Notes in light of the Program's universal "heads I win; tails you lose" investment strategy and BNYM's interest in protecting its own profitable business relationships with Lehman. SOF ¶¶45-47. Accordingly, the proposed Class should be certified as to both of Plaintiff's ERISA claims.

B. Numerosity Is Satisfied Because IBEW May Represent Participants Holding Any of the 10 Lehman Notes

[redacted] participants who suffered losses as a result of Defendant's imprudent investments in the Lehman Notes. Motion at 13. While the parties disagree over which participants are ERISA-governed, *see* Def. Mem. at 16-17, this may be confirmed once the Class is certified and does not preclude certification in any event because Defendant concedes that the Class totals, at a minimum, between [redacted] more than sufficient tosatisfy numerosity in this Circuit. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473 (2d Cir. 1995) (presumption at 40+ class members).

To escape this unavoidable conclusion, Defendant now challenges for the first time Plaintiff's standing to represent participants holding any of the 9 Lehman Notes not held in the Plan's account.[4] *See* Def. Mem. at 17-21. To be clear, all 10 Notes are Lehman floating rate notes subject only to the credit risk of Lehman; any differences among the Notes are trivial and entirely irrelevant to the question here presented: whether ***any*** Lehman floating rate note was permissible in the Program in light of the significant concerns surrounding Lehman as a whole, as well as the credit risk associated with Lehman floating rate notes in particular. *See* Motion at 6-8; Def. Mem. at 18.

First, Defendant cannot point to a single analogous ERISA case denying standing; instead, it relies almost exclusively on securities fraud caselaw. Even within the securities fraud context, however, courts regularly accept plaintiffs' standing to represent absent class members holding materially similar securities. *See, e.g., Emps.' Ret. Sys. of the Gov't of the Virgin Islands v. J.P. Morgan Chase & Co.*, 804 F. Supp. 2d 141, 150 (S.D.N.Y. 2011); *Teamsters Local 445 Freight Div. Pension Fund v. Bombardier Inc.*, No. 05-1898, 2005 WL 2148919, at *7-*8 (S.D.N.Y. Sept. 6, 2005).[5] These cases are analogous to the instant action and therefore support Plaintiff's standing to represent all Lehman Note holders because Section 10(b) securities fraud claims, like Plaintiff's ERISA claims here, require proof of a common course of misconduct by the defendant that resulted in the plaintiffs' investment losses.

---

[4] Significantly, Defendants never challenged Plaintiff's standing under either Federal Rule of Civil Procedure 12 or 56 and, indeed, produced discovery for all 10 Lehman Notes.

[5] *See also In re Dynex Capital, Inc. Sec. Litig.*, No. 05-1897, 2006 WL 314524, at *12 (S.D.N.Y. Feb. 10, 2006) (plaintiff had standing to represent all classes of bonds because "plaintiff alleges that defendants made the exact same misrepresentations with respect to both series of bonds and that the bond collateral suffered from the same defects"), *vac'd in part on other grounds*, 531 F.3d 190 (2d Cir. 2008); *In re Salmon Analyst Level 3 Litig.*, 350 F. Supp. 2d 477, 497 (S.D.N.Y. 2004) (finding that a bondholder had standing to bring claims on behalf of other classes of bondholders because the injuries alleged were substantively similar).

Accordingly, Defendant's reliance on *Pub. Emps.' Ret. Sys. of Miss. v. Merrill Lynch & Co.*, 714 F. Supp. 2d 475 (S.D.N.Y. 2010), *In re Lehman Bros. Secs. & ERISA Litig.*, 684 F. Supp. 2d 485 (S.D.N.Y. 2010), *New Jersey Carpenters Health Fund v. Residential Capital, LLC*, No. 08-8781, 2010 WL 1527528 (S.D.N.Y. Mar. 31, 2010), and *In re Morgan Stanley Mortg. Pass-Through Certificates Litig.*, No. 09-2137, 2010 WL 3239430 (S.D.N.Y. May 18, 2010), is wholly misplaced because those cases involved only Sections 11, 12, and 15 claims under the Securities Act of 1933, for which liability is necessarily tethered to specific offering materials for specific securities. *See* Def. Mem. at 18-20. Judge Koeltl explains this important distinction in *J.P. Morgan Chase & Co.*:

> The actionable conduct under Section 11 is thus the specific registration statement containing misrepresentations; under Section 12, it is the specific prospectus or oral communication. Unlike a Section 10(b) plaintiff, a Section 11 or 12(a)(2) plaintiff is not suing over a broader course of conduct. A plaintiff who purchased a security issued pursuant to one particular registration statement therefore has suffered harm, and has standing to sue, only with respect to the specific registration statement and prospectus that cover the specific security that it purchased. The plaintiff was not harmed by, and thus has no standing to sue for, alleged misrepresentations contained in other prospectuses or registration statements offering other securities that it did not purchase.

804 F. Supp. 2d at 150-51. Therefore, contrary to Defendant's argument, Plaintiff has standing to represent all participants holding any of the ten Lehman Notes, and the proposed Class is sufficiently numerous for certification.

C. Class Treatment Is Superior to Hundreds of Individual Lawsuits

Defendant rejects the superiority of the class action mechanism here because it assumes the "barriers to individual litigation are low in this case," and that many Class members have either commenced litigation or indicated their intention to do so. Def. Mem. at 22. However, history [redacted] investments in the Lehman Notes. Motion at 13. More than three years later, Defendant now directs the court to a total of 10 individual lawsuits – one of which is the current action and another of which is currently pending before Judge Richard Sullivan against the same Defendant concerning the same investments on behalf of non-ERISA participants [redacted] aggrieved participants whose Lehman losses have not been addressed.

The truth is, even "highly sophisticated institutional investors" with greater Lehman losses than Plaintiff's do ***not*** "have equal, if not stronger, incentive to sue," *id.* at 21-22, because of numerous financial and practical impediments, including (1) the sheer magnitude and cost of the [redacted] 2) the threats of fee shifting under ERISA or even counterclaims against Class members' boards of trustees, as leveled here, *see* Dkt. Nos. 67 and 144, respectively, and (3) the "strong disincentive to initiate individual lawsuits because [Class members] may not be willing to sue their securities custodian with whom they have active ongoing relationships." *AFTRA*, 269 F.R.D. at 355. Further, efficiency supports the concentration of the litigation in this forum due to the Court's familiarity with the complex issues involved, as evidenced by its numerous decisions and orders in this matter. For these reasons and others described in Plaintiff's Motion, the "superiority" requirement of Rule 23(b)(3) is satisfied here such that the Class should be certified, Plaintiff should be appointed Class Representative, and Robbins Geller should be appointed Class Counsel.

III. PROFESSOR MILLER'S EXPERT OPINION IS PROPER AND SUPPORTS CERTIFICATION

Defendant's feeble attack on the opinion of Plaintiff's expert, Professor Geoffrey Miller, as "improper" must not be countenanced for a number of reasons. *See* Def. Mem. at 24-25. First, similar testimony from Professor Miller was not only admitted but considered by Judge Scheindlin during class certification briefing in the *AFTRA* litigation. Next, Defendant conveniently omits that it offers its own class certification expert – Dr. Kevin Ugone – to opine on similar matters to oppose class certification. Moreover, Defendant does not challenge Professor Miller's qualifications nor point to a single example of how Professor Miller's report invades the province of the jury.

In accordance with applicable precedent, Professor Miller's opinion is proffered only on the issue of whether Plaintiff's allegations "are capable of being proved on a common basis for all class members" – something he is clearly qualified to do. *Fogarazzo v. Lehman Bros., Inc.*, No. 03-5194, 2005 WL 361205, at *2 (S.D.N.Y. Feb. 16, 2005).[6] That is, his opinion is offered to describe and explain that central factual issues are common to the class as a whole – not, as Defendant suggests, to opine on legal presumptions that should apply, or even to quantify the extent of the damage.

Contrary to Defendant's position, Professor Miller is not offering any legal opinion whatsoever, nor is he telling the would-be-trier-of-fact how it must decide. Rather, based on his education, experience (including *AFTRA*), and background, Professor Miller evaluated a volume of evidence regarding how the Program was operated, including the various protocols in place regarding investment risk and monitoring, fiduciary oversight and responsibility, as well as the Agreements and Guidelines in place during the relevant time period. Based on his extensive analysis, and its application to his experience in *AFTRA*, Professor Miller opined that certification as a class is both appropriate and effective. Defendant and its experts are free to disagree, but any challenge to Professor Miller's opinion goes only to weight, not ultimate admissibility.

---

[6] S*ee also In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 135 (2d Cir. 2001) (admitting expert report, noting that "the question for the district court at the class certification stage is whether plaintiffs' expert evidence is sufficient to demonstrate ***common questions of fact warranting certification*** of the proposed class, not whether the evidence will ultimately be persuasive"), *superseded by statute on other grounds as stated in Attenborough v. Constr. & Gen. Bldg. Laborers' Local 79*, 238 F.R.D. 82, 100 (S.D.N.Y. 2006); *In re Worldcom, Inc. Sec. Litig.*, 219 F.R.D. 267, 296-97 (S.D.N.Y. 2003) (same).

DATED: March 15, 2012

ROBBINS GELLER RUDMAN
& DOWD LLP
PAUL J. GELLER (*pro hac vice*)
STEPHEN R. ASTLEY (*pro hac vice*)
ELIZABETH A. SHONSON (*pro hac vice*)
SABRINA E. TIRABASSI (*pro hac vice*)
JESSE S. JOHNSON (*pro hac vice*)

/s/ Stephen R. Astley
STEPHEN R. ASTLEY

120 East Palmetto Park Road, Suite 500
Boca Raton, FL 33432
Telephone: 561/750-3000
561/750-3364 (fax)

ROBBINS GELLER RUDMAN
& DOWD LLP
SAMUEL H. RUDMAN
DAVID A. ROSENFELD
58 South Service Road, Suite 200
Melville, NY 11747
Telephone: 631/367-7100
631/367-1173 (fax)

Attorneys for Plaintiff and Proposed Class

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 15, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a Notice of Electronic Filing to all counsel of record.

/s/ Stephen R. Astley
STEPHEN R. ASTLEY